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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

JAMES DESAUTEL,  
Plaintiff,

Civil No. 10-430-AA  
OPINION AND ORDER

vs.

MICHAEL J. ASTRUE,  
Commissioner of Social Security,  
Defendant.

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AIKEN, Chief Judge:

Plaintiff, James Desautel, brings this action pursuant to the Social Security Act (the Act), 42 U.S.C. § 405(g), to obtain judicial review of a final decision of the Commissioner. The Commissioner denied plaintiff's applications for Title II disability insurance benefits (DIB) and Title XVI supplemental security income (SSI) disability benefits under the Act. For the reasons set forth below, the Commissioner's decision is reversed and remanded for the payment of benefits.

#### **PROCEDURAL BACKGROUND**

On April 10, 2007, plaintiff protectively filed applications for both DIB and SSI. Tr. 129-36. After the applications were denied initially and upon reconsideration, plaintiff timely requested a hearing before an administrative law judge (ALJ). Tr. 88-96. On May 20, 2009, an ALJ hearing was held before the Honorable Patricia Hartman. Tr. 17-47. On July 10, 2009, ALJ Hartman issued a decision finding plaintiff not disabled within the meaning of the Act. Tr. 55-62. After the Appeals Council declined to review the ALJ decision on February 18, 2010, plaintiff filed a complaint in this Court. Tr. 1-4.

#### **STATEMENT OF THE FACTS**

Born on December 5, 1955, plaintiff was 50 years old on the alleged onset date of disability, and 53 years old at the time of the hearing. Tr. 129, 21. Plaintiff graduated from high school. Tr. 22. Plaintiff has past relevant work experience as a

delivery driver, laborer, fabric warehouse packer, and electrical panel technician. Tr. 151. He alleges disability beginning June 30, 2006 due to degenerative disc disease, acute lower back pain, and situational depression. Tr. 205.

A third-party witness, Ms. Christina Walsh, prepared a Third-Party Adult Function Report and testified at the hearing. Tr. 38-9, 157-64. A vocational expert (VE) also testified at the hearing. Tr. 40-46. The VE opined that there were sedentary or light exertion jobs available in the local economy which plaintiff could perform. Tr. 43. However, when asked to assume that plaintiff's testimony relative to his limitations were credible, the VE testified that the claimant would not be able to perform any of the sedentary or light exertion jobs identified. Tr. 43. In addition, when asked if missing two days of work would preclude sustained employment, the VE responded yes. Tr. 46.

#### **STANDARD OF REVIEW**

This court must affirm the Secretary's decision if it is based on proper legal standards and the findings are supported by substantial evidence in the record. Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). The court must weigh "both the evidence that supports and

detracts from the Secretary's conclusions." Martinez v. Heckler, 807 F.2d 771, 772 (9th Cir. 1986).

The initial burden of proof rests upon the claimant to establish disability. Howard v. Heckler, 782 F.2d 1484, 1486 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected . . . to last for a continuous period of not less than 12 months. . . ." 42 U.S.C. § 423(d)(1)(A).

The Secretary has established a five-step sequential process for determining whether a person is disabled. Bowen v. Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502, 416.920. First the Secretary determines whether a claimant is engaged in "substantial gainful activity." If so, the claimant is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R. §§ 404.1520(b), 416.920(b).

In step two the Secretary determines whether the claimant has a "medically severe impairment or combination of impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R. §§ 404.1520(c), 416.920(c). If not, the claimant is not disabled.

In step three the Secretary determines whether the impairment meets or equals "one of a number of listed impairments that the Secretary acknowledges are so severe as to preclude substantial gainful activity." Id.; see 20 C.F.R.

§§ 404.1520(d), 416.920(d). If so, the claimant is conclusively presumed disabled; if not, the Secretary proceeds to step four. Yuckert, 482 U.S. at 141.

In step four the Secretary determines whether the claimant can still perform "past relevant work." 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant can work, he is not disabled. If he cannot perform past relevant work, the burden shifts to the Secretary. In step five, the Secretary must establish that the claimant can perform other work. Yuckert, 482 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) & (f). If the Secretary meets this burden and proves that the claimant is able to perform other work which exists in the national economy, he is not disabled. 20 C.F.R. §§ 404.1566, 416.966.

## **DISCUSSION**

### I. The ALJ's Findings

At step one of the five step sequential evaluation process outlined above, the ALJ found that plaintiff had not engaged in substantial gainful activity since the alleged onset date. Tr. 57, Finding 2. At step two, the ALJ found that plaintiff had the following severe impairment: degenerative disc disease with low back pain. Tr. 57, Finding 3. At step three, the ALJ found that plaintiff's impairment did not meet or equal the requirements of a listed impairment. Tr. 58, Finding 4.

The ALJ determined that plaintiff had the residual functional capacity (RFC) to perform light work. Tr. 58, Finding

5. Plaintiff was limited to work that would not require climbing ladders, ropes or scaffolds, and would require only occasional climbing of stairs, kneeling, crouching, crawling, bending, twisting, and stooping. Id. In addition, plaintiff was restricted from dealings with foot controls, dangerous unprotected machinery, unprotected heights, or vibrating tools. Id.

At step four, the ALJ decided that plaintiff was able to perform his past relevant work as a silicon wafer, packer, and truck delivery person. Tr. 61, Finding 6. Accordingly, at step five, the ALJ found that plaintiff was not disabled. Tr. 61, Finding 7.

## II. Plaintiff's Allegations of Error

Plaintiff alleges that the ALJ erred by: 1) failing to provide clear and convincing reasons for finding plaintiff's testimony not credible; 2) improperly evaluating the medical evidence; 3) determining plaintiff's impairment did not meet or equal Listing 1.04: Disorders of the Spine, 20 C.F.R. § 404, Subpart P, Appendix 1, Listing 1.04; 4) finding that plaintiff could perform past relevant work; 5) failing to address the third-party testimony; and 6) failing to fully develop the record with regard to plaintiff's mental impairments.

### A. Plaintiff's Credibility

Plaintiff asserts that the ALJ erred by failing to provide clear and convincing reasons for rejecting his testimony regarding the extent of his impairments. Pl.'s Br. at pg. 15.

When a claimant has medically documented impairments that could reasonably be expected to produce some degree of the symptoms complained of, and the record contains no affirmative evidence of malingering, "the ALJ may reject [his] testimony regarding the severity of symptoms only if he makes specific findings stating clear and convincing reasons for doing so." Smolen v. Chater, 80 F.3d 1273, 1281-82 (9th Cir. 1996) (internal quotation omitted). If the "ALJ's credibility finding is supported by substantial evidence in the record, we may not engage in second-guessing." Thomas v. Barnhart, 278 F.3d 947 (9th Cir. 2002). A general assertion that plaintiff is not credible is insufficient; the ALJ must "state which . . . testimony is not credible and what evidence suggests the complaints are not credible." Dodrill v. Shalala, 12 F.3d 915, 918 (9th Cir. 1993).

Before addressing plaintiff's first allegation of error, a preliminary issue must be addressed. Plaintiff initially alleged that his disability was due to pain caused by an on-the-job back injury sustained in 1992. However, plaintiff's medical records, from 1993 on, indicate that plaintiff's ongoing pain is instead due to the natural progression of a degenerative disc disease. See Tr. 235. I find that the error was harmless because, either way, plaintiff's claim for disability is based on back pain, and as such the error is nonprejudicial to the plaintiff. Stout v. Comm'r of Soc. Sec. Admin., 454 F.3d 1050, 1055 (9th Cir. 2006) (mistakes that are "nonprejudicial to the claimant or irrelevant to the ALJ's ultimate disability conclusion" are harmless error).

Moving to plaintiff's credibility determination, plaintiff testified he has "severe low back pain, wherein moving, twisting, bending, and lifting put it into spasm." Tr. 59, 27-30. Plaintiff also stated that "he can only walk one-half block; stand for 10-15 minutes, sit for 15 minutes . . . [and that] the pain radiates through his hips and down his legs." Id. As such, plaintiff said that his daily activities were very limited, and his sleep disturbed. Tr. 31-32. Plaintiff further testified that "he visits the doctor every three months . . . [but] that his pain is becoming worse." Tr. 59, 27-30.

The ALJ determined that plaintiff's medically determinable impairments could reasonably be expected to produce some degree of symptoms, but that his statements regarding the extent of these symptoms were not credible. Tr. 59-61.

Specifically, the ALJ found that plaintiff's testimony regarding his pain "borders on exaggeration, since the evidence does not support such susceptibility and vulnerability." Tr. 60. The ALJ determined plaintiff's testimony was inconsistent with a light-level RFC. Id. The ALJ cited to medical evidence from 1993, in which Dr. Rotter opined that plaintiff's activities were only mildly limited after his 1992 injury. Id. The ALJ reasoned that, being only mildly limited, plaintiff should be able to lift "10 pounds frequently and 20 pounds occasionally" and perform occasional "bending, twisting, crawling, etc." Id. Thus, it appears as though the ALJ relied on plaintiff's period of mild limitation, nearly 20 years ago, to discount his testimony

regarding his current limitations. However, because the medical evidence indicates that plaintiff's condition is one which worsens over time, discussed in greater detail below, his level of activity in 1993 has little bearing on today's disability assessment. Therefore, I find that the ALJ's credibility determination was not based on substantial evidence.

The ALJ, however, discounted plaintiff's testimony regarding the extent of his impairments for an additional reason. In a questionnaire submitted by a worker's compensation insurer, Liberty Northwest Mutual, to Dr. Coletti in 2007, the insurer noted an inconsistency in plaintiff's reported work history: "Mr. Desautel now gives a different work history from the one referenced in your December report, namely that he had been working until 2006, whereas he told his chiropractor on 10-12-07 that he had last worked in 1996 . . ." Tr. 60, 319.

Inconsistencies in a plaintiff's testimony can serve as a basis for discrediting it. Burch v. Barnhart, 400 F.3d 676, 680 (9th Cir. 2005). Noting the inconsistencies in plaintiff's testimony regarding his work history, the ALJ concluded "Dr. Coletti's theory of 'pathological advancement' of the claimant's back condition seems to corroborate Dr. Webster's report of poor effort, suggesting a non-organic cause of pain and a resultant lack of credibility." Tr. 61.

However, the ALJ misconstrued the record. First, in the chiropractic report from Dr. Fish, dated October 12, 2007, plaintiff reported a work history as follows: "He applied for

social security and had been out of work since 1996. He has been denied since. He has reinjured himself parking cars for a job in June of 2006." Tr. 376. Thus, plaintiff reported working until 2006. As such, plaintiff's reported work history appears consistent throughout, and as such, cannot in this case serve as a basis to discount his credibility.

Second, at no time did Dr. Coletti opine that plaintiff's back condition had been pathologically advanced. Rather, Dr. Coletti stated the contrary: "I have no objective basis for concluding that the work event aggravated, enhanced, or accelerated pathological changes in his lumbar spine any more than sedentary activities would have done." Tr. 319. Dr. Coletti's statement merely suggests that plaintiff's limitations were not related to an injury, but rather caused by his progressive, degenerative spinal condition. Tr. 318-9. Therefore, it is impossible to read Dr. Coletti's revised report from 2008 as corroborating Dr. Webster's report of poor effort.

Accordingly, I find that the ALJ failed to provide clear and convincing reasons for rejecting plaintiff's testimony. Contrary to the ALJ's opinion, plaintiff's back condition has worsened over time, and as such, Dr. Rotter's report from 1993 is unpersuasive. Further, plaintiff's testimony regarding his work history is consistent. As such, the record supports plaintiff's testimony that his activities are limited and accomplished with difficulty.

When an ALJ improperly rejects a plaintiff's testimony

regarding limitations and the plaintiff would deem to be disabled if the testimony were credited, the court "will not remand solely to allow the ALJ to make specific findings regarding that testimony." Varney v. Secretary of Health & Human Services, 859 F.2d 1396, 1401 (9th Cir. 1988). Therefore, I credit plaintiff's testimony as a matter of law. Id.

#### B. Evaluation of the Medical Evidence

Plaintiff also alleges that the ALJ erred by providing legally insufficient reasons for rejecting the opinions of his primary, treating physician, Leonard Mankin M.D., and consulting physician, Daniel Gibbs, M.D. Pl.'s Br. at pg. 12-15.

There are three types of medical opinions in social security cases: those from treating physicians, examining physicians, and non-examining physicians. Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995). "[G]reater weight is afforded to the opinion of a treating physician than to that of [a] non-treating physician, because the treating physician is employed to cure and has a greater opportunity to know and observe the patient as an individual." Ramirez v. Shalala, 8 F.3d 1449, 1453 (9th Cir. 1993) (internal quotation omitted). A treating physician's opinion is controlling when it is "well supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent" with other evidence of record. 20 C.F.R. § 404.1527(d)(2). When the treating physician's opinion is uncontroverted, the ALJ must give "clear and convincing reasons" before rejecting the opinion. Lester, 81 F.3d at 830. When the

treating physician's opinion is disputed, the ALJ must give "specific and legitimate reasons" before rejecting the opinion. Id.

1. Dr. Gibbs

Plaintiff argues that the ALJ's rejection of Dr. Gibbs' opinion, in favor of reliance on Dr. Webster's opinion, was improper because objective medical evidence supports Dr. Gibbs' opinion.

Dr. Webster examined plaintiff once in 2007 for 25 minutes. Tr. 221-6. The exam notes indicate that Dr. Webster spent the majority of that time examining physical aspects which have no bearing on plaintiff's disability. Id. Still, Dr. Webster opined that plaintiff had no work related limitations. Tr. 225-6. Based on Dr. Webster's findings, the ALJ determined that plaintiff could return to his past relevant work, and as such, was not disabled. Tr. 61.

Subsequent to his exam with Dr. Webster, plaintiff had an MRI. This 2008 MRI revealed severe degenerative disc disease, stenosis, and spinal arthritis. Tr. 305-7. Dr. Gibbs examined plaintiff after the 2008 MRI, thereby incorporating this evidence. Dr. Gibbs opined that plaintiff's "pain is authentic and I can't imagine that he will be able to work given the longstanding back problems that have only worsened with time." Tr. 349. The ALJ rejected Dr. Gibbs' opinion in the context of discussing plaintiff's work history and worker's compensation claim, and accepting instead the opinion of Dr. Webster. Tr. 60.

A physician's opinion of the level of impairment may be rejected if it is unreasonable in light of the other evidence. Morgan v. Comm'r of Soc. Sec. Admin., 169 F.3d 595, 601 (9th Cir. 1999). For example, if Dr. Gibbs' opinion was uncorroborated by objective medical evidence, it would be proper for the ALJ to discount his opinion regarding plaintiff's level of impairment. I find, however, that the medical evidence fully supports Dr. Gibbs' findings.

Further, when another doctor, Dr. Coletti, who had examined plaintiff in 2007 and also concluded that plaintiff's pain was "non-organic," was confronted with this new evidence, he revised his opinion. Compare Tr. 325 and Tr. 318. In an addendum to his 2007 report, Dr. Coletti opined that the 2008 MRI revealed a clear basis for plaintiff's pain. Tr. 318. Unlike Dr. Coletti, Dr. Webster was never asked to review the additional medical evidence and determine whether those findings would prompt him to re-assess the cause of plaintiff's pain.

Upon a thorough review of the record, I find that the ALJ failed to cite any evidence after the 2008 MRI that controverts Dr. Gibbs' opinion regarding plaintiff's physical capacity for work. As such, I find that Dr. Gibbs' opinion of plaintiff's level of impairment is reasonable based upon the complete record. Morgan, 169 F.3d at 601. Moreover, because I find that Dr. Webster's opinion is not supported by the complete record, it does not serve as a proper reason for the ALJ to discount the opinion of Dr. Gibbs. Therefore, I find that the ALJ erred by

failing to provide adequate reasons for rejecting the opinion of Dr. Gibbs.

2. Dr. Mankin

Plaintiff argues that the ALJ erred by failing to address or give sufficient weight to Dr. Mankin's opinion. Pl.'s Br. at pg. 13. Dr. Mankin had been plaintiff's primary, treating physician for approximately one year at the time of the hearing. Tr. 390. Dr. Mankin found plaintiff's pain to be severe enough to prescribe Flexeril to prevent muscle spasms and Vicodin to manage pain. Tr. 390-99. In addition, Dr. Mankin completed a handicapped parking placard for plaintiff due to plaintiff's limited mobility, specifically his inability to walk more than 100 yards without severe pain. Tr. 395, 418.

The ALJ mentioned Dr. Mankin, but only in regard to plaintiff's mental state. Tr. 61. The ALJ merely alluded to Dr. Mankin's "40 minute session" with plaintiff, indicating that 40 minutes was inadequate to form a valid medical opinion about whether plaintiff was clinically depressed. Id. However, plaintiff was not seeing Dr. Mankin for treatment of depression; rather, the record indicates that plaintiff sought treatment from Dr. Mankin for his back pain. Tr. 390-99. The ALJ seemed to ignore this fact. Tr. 61.

As plaintiff's treating physician, Dr. Mankin's opinion is controlling if supported by medical evidence. 20 C.F.R. § 404.1527(d)(2). As discussed in the previous section, objective medical evidence in the record supports Dr. Mankin's opinion.

Further, because Dr. Mankin's assessment was the most recent and based upon additional evidence, I find it reasonable to read his opinion as consistent with any earlier doctors who had differing opinions based on an incomplete record. Accordingly, the ALJ should have provided "clear and convincing reasons" for rejecting Dr. Mankin's opinion. Lester, 81 F.3d at 830. Even supposing Dr. Mankin's opinion is read as inconsistent with that of other doctors, the ALJ should have at least articulated "specific and legitimate reasons" for discounting the opinion. Id. The ALJ failed completely to address the opinion of Dr. Mankin. Therefore, I find that the ALJ erred by failing to provide adequate reasons for rejecting Dr. Mankin's opinion.

### 3. Crediting the Opinions of Drs. Mankin and Gibbs

Where, as here, the ALJ fails to provide adequate reasons for rejecting the opinions of a treating or examining physician, that opinion must be credited "as a matter of law." Lester, 81 F.3d at 834 (internal quotation omitted). Therefore, this Court credits Dr. Mankin's opinion that plaintiff's degenerative disc disease was severe and that his primary symptoms were extreme pain in the back, hips, and legs causing him limited mobility. Further, this Court credits the opinion of Dr. Gibbs in that plaintiff's pain is authentic and that his condition will worsen with time. Based on these opinions and the testimony of the Vocational Expert (VE), I find plaintiff unable to engage in past relevant work and unable to perform other work as it exists in the national economy.

Moreover, I apply the following factors to decide whether this case should be remanded for payment of benefits. They are:

(1) the ALJ has failed to provide legally sufficient reasons for rejecting such evidence, (2) there are no outstanding issues that must be resolved before a determination of disability can be made, and (3) it is clear from the record that the ALJ would be required to find the claimant disabled were such evidence credited.

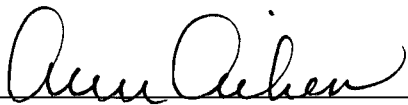
Harman v. Apfel, 211 F.3d 1172, 1178 (9th Cir. 2000), cert. denied, 531 U.S. 1038 (2000). Based upon application of these factors, I find that it is appropriate to remand this case for payment of benefits. As such, this Court declines to discuss plaintiff's other allegations of error.

#### CONCLUSION

The Commissioner's decision is not based on substantial evidence, and is therefore, reversed and remanded for the payment of benefits. This case is dismissed.

IT IS SO ORDERED.

Dated this 20<sup>th</sup> day of May 2011.

  
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Ann Aiken  
United States District Judge